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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-7081

MARK SIZEMORE,)
)
Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Respondent.)

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS DIVISION I

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ON PETITION

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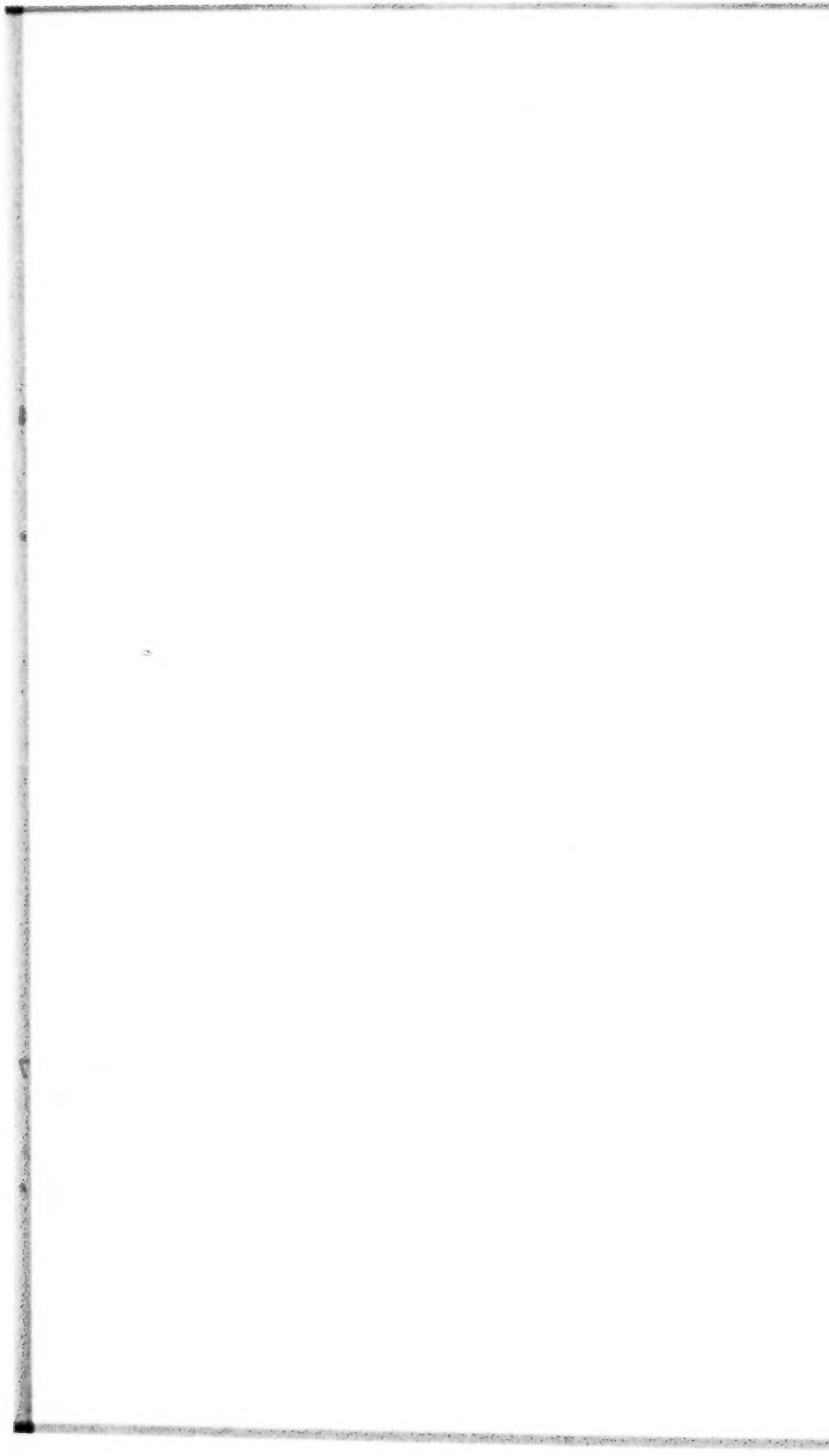

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PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS DIVISION I

Mark Sizemore, by his attorney, Ferd Samper, Jr., prays that a writ of certiorari issue to review the judgment of the Indiana Court of Appeals, Division I, in affirming the judgment of the Fayette County Circuit Court, Connersville, Indiana, upon his conviction of possession of a controlled substance, in violation of Burns Indiana Statutes, Annot., §35-3333(c), I.C. 16-6-8-3.

OPINION OF THE INDIANA COURT OF APPEALS

The opinion of the Indiana Court of Appeals, Division I, has been officially reported, and is cited in 308 N.E. 2d 400, 41 Ind. Dec. 180. A copy is reproduced herein as Exhibit "A" to this petition.

JURISDICTION

1. The judgment of the Indiana Court of Appeals, Division I, was entered on March 29, 1974.

2. A timely Petition for Rehearing was filed with the Clerk of the Indiana Court of Appeals, Division I, on April 4, 1974. The Petition for Rehearing was denied on April 23, 1974. A copy is reproduced herein as Exhibit "B" to this petition.

3. A timely Petition for Transfer to the Supreme Court of Indiana was applied for on May 9, 1974, and was denied on September 9, 1974. A copy is reproduced herein as Exhibit "C" to this petition.

4. The jurisdiction of this Court is invoked under the provisions of Title 28,

United States Code, §1257 (3).

QUESTIONS PRESENTED

Were rights of the defendant under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States violated when the trial court allowed into evidence, over the objection of the defendant, the fruits of a warrantless search and seizure made without probable cause, subsequent to a non-custodial arrest.

CONSTITUTIONAL PROVISIONS

Fourth Amendment to the Constitution of the United States reads as follows:

> "Unreasonable searches and seizures.--The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to the Constitution of the United States reads as follows:

> "Criminal actions-Provisions concerning-Due process of law and just compensation clauses. --No person shall be held to answer

for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of Amendment 14 to the Constitution of the United States reads as follows:

"Citizenship--Due process of law--Equal protection.--All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jursidction the equal protection of the laws."

STATEMENT OF THE CASE

On January 16, 1973 at approximately 12:00 a.m. Officers Terry Worley and John Earl, Connersville city policemen, were on duty and in a patrol car at 30th and Ohio streets in Connersville, Indiana. They observed the defendant, Mark Sizemore, in a red 1966 Chevrolet van pulling away from a curb. He wasn't speeding, but pulled away in a fast manner. The officers pulled in behind the van and noticed a taillight out on the rear of the van. At 28th and Ohio, the defendant made a rolling stop. The officers followed the van further and the defendant crossed the center line three times before turning west on 24th street and then south on Virginia Avenue. The officers turned on their red light and stopped the defendant at 24th and Ohio (Tr. pp. 10 to 13).

Officer Earl asked the defendant for his driver's license and asked him

about the taillight. Officer Earl then arrested the defendant for the defective taillight (Tr. p. 14, lines 27 and 28).

No uniform traffic ticket was prepared at that time (Tr. p. 15, line 28).

Officer Worley testified that he had no search warrant in his possession. There was no evidence that the defendant had in his possession a weapon. Officer Worley testified that he had never known Mark Sizemore to carry a gun (Tr. pp. 16 to 18).

After the arrest of the appellant a patdown search was conducted for the limited purpose of ascertaining if the appeallant was armed or had evidence on his person that could be destroyed. (Tr. p. 27 and p. 38).

The search of the appellant disclosed a rolled cigarette in his left breast pocket (Tr. p. 67). After the search the cigarette was kept in Officer Worley's pocket until being placed in an envelope

and marked appropriately (Tr. pp. 67 to 68). After the appellant's arrest he was advised of his constitutional rights (Tr. pp. 68 to 69). Sheriff Max Huffman conducted a field test in the presence of Officer Worley (Tr. p. 69 and p. 103). Sheriff Huffman used the Val-Tax Testing Device and the preliminary examination resulted in a positive finding indicating the presence of marijuana (Tr. p. 104 and p. 106).

The petitioner first raised the constitutional questions concerning the unlawful search in a Motion to Suppress Evidence which was filed with the trial court prior to trial. A hearing was held prior to the trial, and at this hearing the Motion to Suppress Evidence was overruled by the trial court. These same constitutional issues were presented in the Motion to Correct Errors. This motion was also overruled by the trial court subsequent to the trial. The questions

were then argued before the Indiana Appellate Court, Division I, on the direct appeal from the judgment of the trial court.

ARGUMENT

Petitioner's claimed constitutional error rises from the search of his person subsequent to the stop of his motor vehicle for a purported routine traffic violation. However, the progression of events will require preliminary explanation.

The trial and first appeal from this cause all took place before this Court's decisions in Gustafson and Robinson. For this reason, the legal argument discussed by both appellant and appellee, along with the fact situation gleaned by both parties from the facts presented at the trial--said facts being interpreted in the light most favorable to the party victorious at the trial stage--were addressed to the issue of the propriety and constitutionality of a search of the person subsequent to a routine traffic

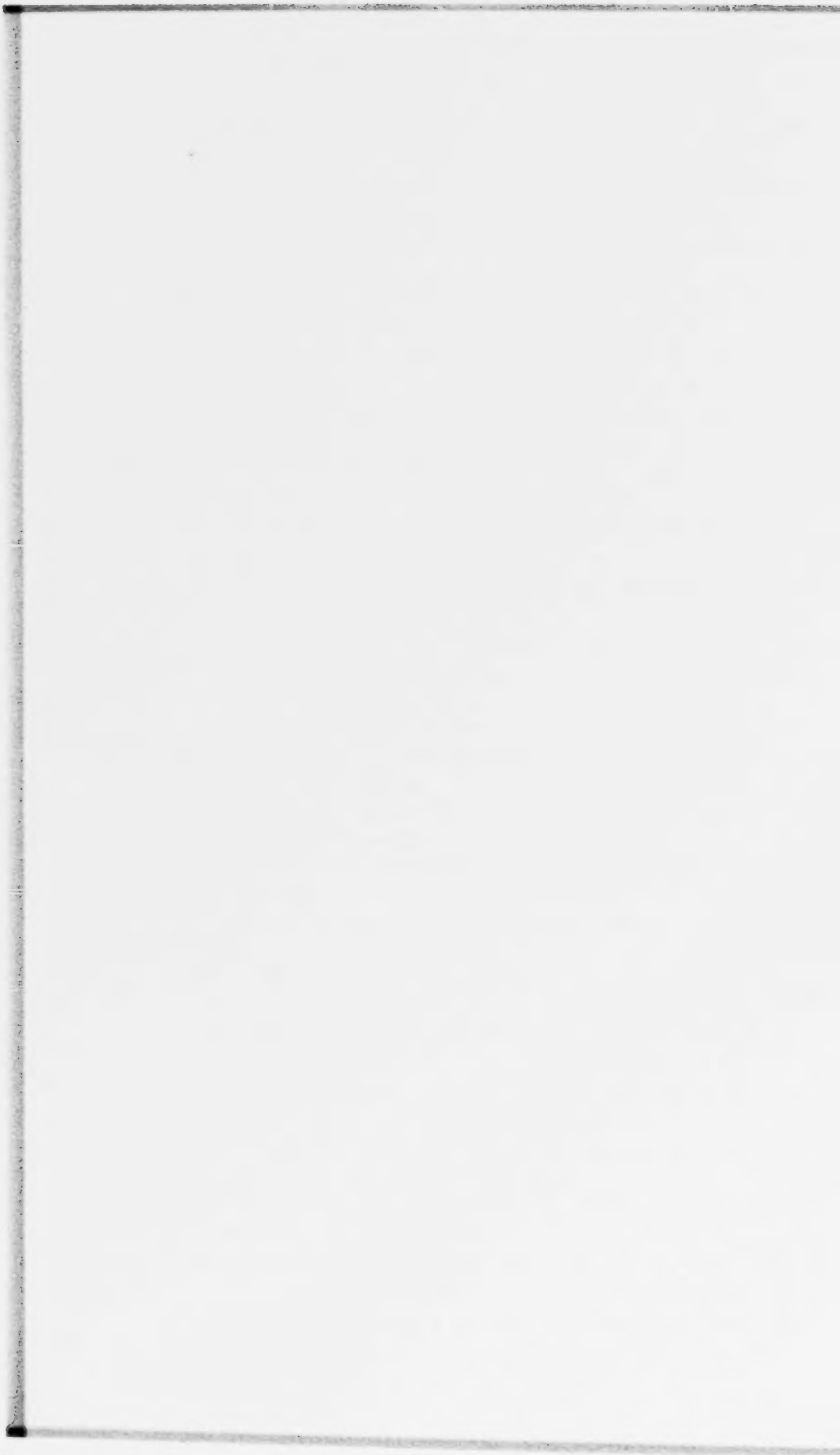
stop. A search which uncovered what was later determined to be contraband as defined by the law of this state. However, sequential to the submission of the briefs on that first appeal, the above decisions were handed down, and the Indiana Court of Appeals, Division I, addressed the issue as one of the propriety and constitutionality of a search preceding a full custodial arrest, although the evidence adduced at trial was not suggestive of such a scenario, and, in fact, neither the petitioner herein, nor the State of Indiana, respondent herein, had so interpreted the evidence. Therefore, the facts, presented in the light most favorable to the respondent, as stated in the Statement of the Case, supra, will be those from which petitioner will continue his argument.

Petitioner's focus in this argument is the propriety and constitutionality of the search of his person which resulted

in the discovery of the evidence, possession of which resulted in his conviction at the trial level. To achieve clarity, petitioner's discussion will be divided into three parts. These components will discuss (A) the nature of the arrest; (B) whether any search would be permissible under the circumstances, and (C) if a search is permissible what is the nature and scope of the allowed search.

(A)

The direct testimony of the arresting officer indicates that the petitioner was first arrested for operating a motor vehicle when that motor vehicle was not equipped with all proper lights. The arrest was for a misdemeanor, and fits within the category of arrests known as "routine traffic stops". Petitioner contends this particular category is not the same as a "full custodial arrest" as explained by this Court in its



decisions in Gustafson v. Florida and U.S. v. Robinson. The traditional treatment of such offenses is for the arresting officer to issue a summons--which serves as notice of the offense--and then release the offender.

Petitioner does not argue that there was anything defective with the initial stop. Police Officials certainly have the right and duty to arrest individuals who commit misdemeanors in their presence. Therefore, an arrest, of a non-full custodial nature, was properly and legitimately effected.

(B)

On those occasions when a police officer in Indiana stops a motorist for a minor traffic violation, as we have here, the officer is not empowered to automatically effect a full custodial arrest and haul a motorist off to the station house. Both I.C. 1971, 9-4-1-130, being Burns §47-2307 and I.C. 1971, 9-4-1-131,

being Burns §47-2308, require that the officer may only issue a summons to the offender and then must allow him to proceed on his way. It is only in the case of a serious traffic offense (Burns §47-2307 [2] to [5]) or in the event a motorist refused to promise to appear in court at a future date (Burns §47-2307 [6]) that the police may effect a full arrest and take the motorist to the police station for booking. In a normal traffic misdemeanor situation a police officer may only impose what may be termed a limited arrest for the purpose of issuing the summons and then must release the motorist from this limited form of custody.

Both the facts and language of Gustafson and Robinson specifically concern the type of traffic violations which require or allow an officer to effect a full custodial arrest. It is apparent from the opinions that the sole

basis for the full scale search of the motorist was the full custodial type of arrest being effected in both of those situations.

> "The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial.
>
> It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical Terry type stop. This is an adequate basis for treating all custodial arrests alike for purposes of search justification." (Emphasis added) U.S. V. Robinson, (1973) 94 S.Ct. at 476.

In a footnote in Robinson this Court made a sharp distinction between the full custodial arrest with which it was concerned in that case, and what was characterized by the Court as a "routine traffic stop, i.e. where the officer

would simply issue a notice of violation and allow the offender to proceed." (Fn. 6 at 477). The majority specifically stated that they were not deciding the constitutionality of searches incident to these routine traffic stops. It is precisely that type of limited arrest resulting from a routine traffic stop which faces us here. While the Fourth Amendment does not prevent a full search incident to a lawful custodial arrest it does not condone a full search incident to a routine traffic stop where the police officer is not authorized to take the motorist into custody. The Indiana Court of Appeals, Division I, justifies the search of the arrestee on the grounds of the nature of the arrest, but where, as here, there is no full custodial arrest the justification and rationale allowing the search is obviously absent.

The United States Court of Appeals, District of Columbia Circuit, Bazelon, C.J.,

in overruling the conviction of Willie Robinson, Jr., by the United States District Court for the District of Columbia, clearly and ably discussed the difference between a full custodial arrest and a routine traffic stop, and the searches which may be made attendant thereto. Although the Court of Appeals holding was subsequently reversed by this Court in its decision on Robinson, the aforementioned footnote indicated this Court would not "reach the question." As that question is the linchpin issue in this cause, the Court of Appeals discussion should be awarded careful scrutiny.

> In determining the extent to which the legitimate governmental interest in insuring the safety of law enforcement officers justifies a search of the person incident to a lawful arrest, a distinction must be drawn between the "routine"traffic arrest--where the officer simply issues a notice of violation and allows the offender to proceed--and the more serious cases in which the officer effects an

"in-custody" arrest in order to transport the traffic offender to the stationhouse for booking. Turning first to the "routine" traffic arrest, it seems evident that the dangers presented in that situation are to some extent similar to, and certainly no greater than those presented in the stop-and-frisk situations involved in TERRY and SIBRON. Like the investigatory stop, the routine traffic arrest is merely a brief on-the-street encounter. Moreover, the vast majority of traffic violators are law-abiding citizens. Indeed '[v]ery few drivers can traverse any appreciable distance without violating some traffic regulation.' and as Chief Judge Fuld of the New York Court of Appeals has noted, "A motorist who exceeds the speed limit does not thereby indicate any propensity for violence or iniquity, and the officer who stops the speeder has not even the slightest cause for thinking that he is in danger of being assaulted." PEOPLE V. MARSH, 20 N.Y. 2d 98, 101, 281 N.Y.S. 2d 789, 228 N.E. 2d 783, 786 (1967).

This is not to say, of course, that a minor traffic stop can never erupt into violence. On the contrary, whenever a police officer confronts a citizen on the street an element of danger is present. But as the stop-and-frisk cases make clear, the mere possibility of danger cannot justify any and all searches the officer may wish to conduct.

The touchstone of the Fourth Amendment is reasonableness, and the possibility that a routine traffic stop might result in injury to the officer, although unquestionably real, is so remote that '[t]o allow the police to routinely search for weapons in all such instances would*** constitute an 'intolerable and unreasonable' intrusion into the privacy of the vast majority of peaceable citizens who travel by automobile'. PEOPLE V. SUPERIOR COURT OF YOLO COUNTY [Kiefer] 3 Cal. 3d 807, 91 Cal. Rptr. 729, 744, 478 P. 2d 449, 464 (1970) (en banc).

We therefore conclude that the permissible scope of searches incident to routine traffic stops arrests, where there is no evidentiary basis for a search and where the officer intends simply to issue a notice of violation and to allow the offender to proceed, must be governed by the teaching of the Supreme Court as set forth in TERRY and SIBRON. Thus the most intrusive search the Constitution will allow in such situations is a limited patdown for weapons, and then only when there exists special facts or circumstances which give the officer reasonable grounds to believe that the person with whom he is dealing is armed and presently dangerous. (Emphasis added) UNITED STATES V. ROBINSON, 471 F. 2d 1082, 1096-97, (CADC 1972).

As is abundantly clear, the scope

of a search incident to a routine traffic arrest should be severly restricted. When the above quoted conclusions are placed in the context of the testimony of the arresting officers--to the effect that both officers knew the petitioner, and never knew him to carry a gun or offer resistance--it is clear that there should most likely have been no search at all.

However, the Indiana Court of Appeals, Division I's present interpretation of the Gustafson and Robinson decisions as allowing a full scale search of anyone who violates any traffic regulation, invites wholesale and groundless intrusions upon the personal property of thousands of motorists. Thus, under this interpretation the vast number of citizens who travel by automobile and who may be stopped for having a multitude of minor traffic offenses, are subject, without further authorization or circumstances,

to not only having the contents of their wallets, pockets and pants cuffs examined by the police, but their entire vehicle as well.

There are only two real justifications for searching a person and his surroundings, without a warrant, whether the actual or potential arrest be custodial in nature, or merely a limited, routine traffic stop under conditions where the defendant-suspect is not to be transported to the local jail and/or police headquarters. Those justifications are (1) where evidence of the crime charged or suspected must be secured, and (2) removal of any weapon the arrestee might seek to employ to resist arrest or effect an escape. The two categories are deserving of different treatment as their central purposes are not the same. The first category is the "search incident to a lawful arrest". The lawful arrest justifies

the search for fruits, instrumentalities, and evidence for which the arrest is made, but may only be made after the arrest is effected. The second category operates on a contrary basis. A broader time period than the time for this search incident to a lawful arrest is created by the necessity of a police officer's protecting himself at all times and pursuant thereto a protective, Terry-type patdown search may be constitutionally executed prior to an arrest based upon probable cause. A narrower area for the search is created by the very fact that there are only certain areas from which threats to the police officer may be obtained. Therefore, although fruits of a search incident to a lawful arrest may be drawn from an area outside the immediate reach of the arrestee, a search for weapons and other dangerous instrumentalities should be limited only to those areas

within the immediate control of the arrestee.

Under either treatment model, there is a scope beyond which the search is clearly improper. In the situation at bar, the stop and limited, routine traffic arrest were pursuant to the Deputy's observation of a misdemeanor being committed in his presence. The sole evidence of the crime charged was to be found at the rear of the motor vehicle where the taillight was not working. Therefore, there was no need to search petitioner for any evidence of the crime which might be destroyed.

The only conclusion which remains is that the officers might have felt compelled to make a search of the petitioner for the limited purpose of discovering whether or not he was carrying some weapon which might pose a threat to the safety of the arresting

officers. Petitioner rejects that conclusion because of the direct statements of the arresting officers. However, against the possibility that such a rationale will be accepted, petitioner next seeks to demonstrate that the scope of such a search was exceeded by its extensive nature.

(C)

> "[t]his Court has held that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope "and" [t]he scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." TERRY V.OHIO, 392 U.S. 1, 17-19, 88 S.Ct. 1868, 1878, 20 L.Ed. 2d 889 (1968).

Subsequent to Terry, in CHIMEL V. CALIFORNIA, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685, (1969), this Court more firmly outlined the law applicable to both searches incident to a lawful arrest and searches constituted

for the protection of the arresting authority. In Chimel, where the defendant was arrested in his home, pursuant to an arrest warrant, the arresting officers, who had no search warrant, proceeded to search the defendant's entire house. The result, reached by this Court, was that "[A]pplication of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner's person and the area within which he might have obtained either a weapon or something that could have been used in evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of the search was therefore, "unreasonable" under the Fourth and Fourteenth Amendments..." Supra, 395 U.S. at 768, 23 L.Ed. 2d at 697.

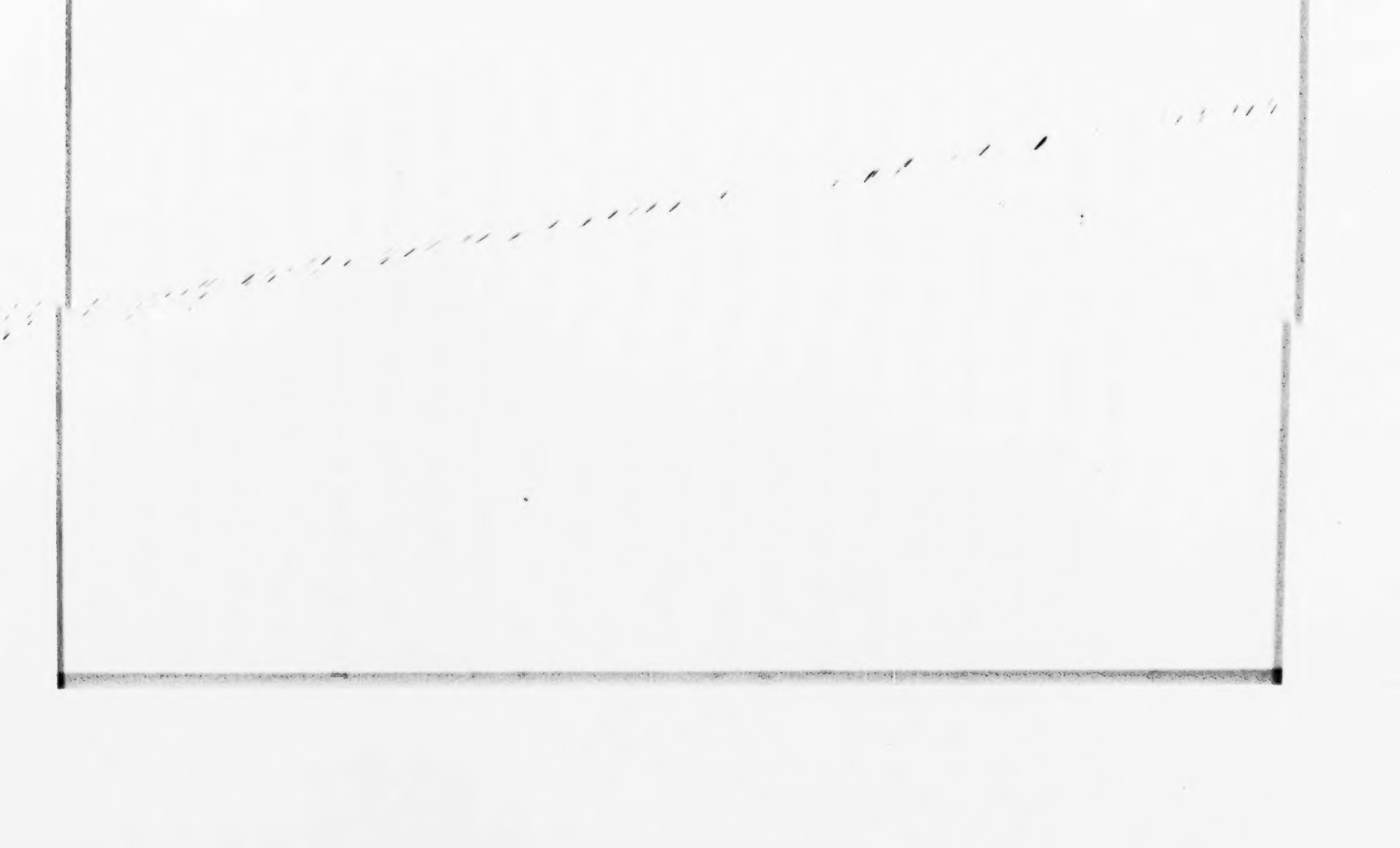
Petitioner contends that even if Gustafson and Robinson are to be extended to cover situations where the arrest is only for a minor traffic offense, and the customary procedure would not entail taking the midsemeanant into police custody, Chimel still remains to act as a brake on the scope of any search made either incident to the lawful arrest or for the protection of the arresting officer. Therefore, even if a search was proper in the situation at bar, the intensity of that search was excessive.

Petitioner addresses his argument to the intensity of the search rather than its scope, because we are assuming that there has been a ruling that the Terry-type protective search rationale has been employed as a justification for the search of petitioner's person. If the only reason for the search is the

protection of the arresting officer, then once the officer has made a determination that the petitioner is not armed, the search should cease. The evidence removed from the shirt pocket of the petitioner consisted of one alleged marijuana cigarette. It would seem that a patdown search, conducted by an experienced police officer, would not have drawn that official to the conclusion that the unidentified bulge of one marijuana cigarette was in fact some instrumentality of destruction. Once the officer has determined that there is no dangerous weapon on the person of the petitioner, the search should have ceased. Any reasonable man would realize that any object which resembles a normal, everyday cigarette would present no danger.

Therefore, assuming the arrest was proper, and assuming the arresting officers felt the petitioner posed a threat and should be searched to determine

if he possessed any dangerous weapon, the search should have then been for the sole and limited purpose of determining the existence of any weapon. After no weapon was discerned, the search should have ended. There was no need for the officer to reach into the shirt pocket of the petitioner and extract whatever it was he felt there. Reaching into that pocket was improper under any current scheme which would allow a search of the petitioner. The result of this improper search was the discovery of the evidence which resulted in this conviction and for that reason the failure to suppress the evidence was not harmless error under the decision of Chapman v. California. The evidence subsequently admitted at the trial was not harmless error under the decisions of Chapman v. California, (1967) 386 U.S. 18,



87 S.Ct. 824, 17 L.Ed. 2d 705, and Harrington v. California, (1969) 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed. 2d 284. Therefore, this case should be reversed.

CONCLUSION

For the foregoing reasons, petitioner, Mark Sizemore, prays that a Writ of Certiorari issue to review the judgment and Opinion of the Indiana Court of Appeals, Division I, entered in these proceedings.

Respectfully submitted,

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EXHIBIT "A"

MARK SIZEMORE v. STATE of INDIANA

COURT OF APPEALS OF INDIANA

FIRST DISTRICT

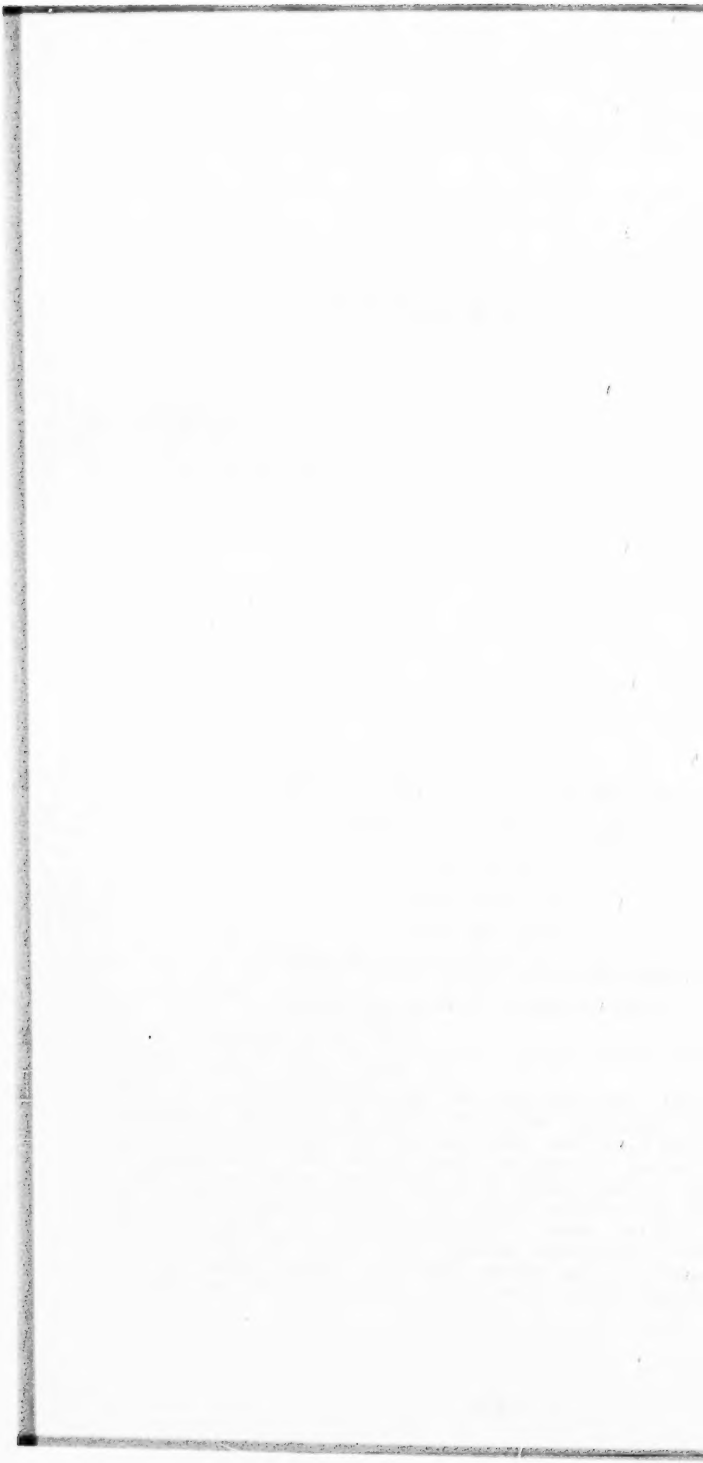
No. 1-973 A169

March 19, 1974

APPEAL FROM THE FAYETTE CIRCUIT COURT

HON. GEORGE L. KERRIGAN, JUDGE

SYNOPSIS: Appeal from conviction by the court without a jury of possession of dangerous drugs: less than 25 grams of marijuana. Police followed a red van which had one tail light not lighted. The van was observed to cross the center line at least three times. At one time the van was driven to the left of the center line for about three blocks. The officers stopped the vehicle because of the faulty tail light and the erratic driving. Sizemore, the driver and sole occupant, was immediately arrested for driving the vehicle with the tail light out. One officer, observing Sizemore while he was being questioned by the other officer, testified that on the basis of



Sizemore's driving and his manner under questioning that Sizemore was driving under the influence and decided to place him under arrest for that offense. Before he made a formal arrest and placed Sizemore in the patrol car, this officer patted down Sizemore and discovered a bulge in a shirt pocket. Sizemore said he did not know what it was. The officer reached in and removed a hand rolled cigarette later identified as containing marijuana. Sizemore was then informed he was under arrest for driving while under the influence and for illegal possession of marijuana. He was advised of his constitutional rights, placed in the patrol car, and taken to headquarters. Sizemore contended (1) that the court erred in overruling his motion to quash the affidavit on the grounds that it did not state the offense charged with sufficient certainty; (2) that the trial court erred in overruling his motion to suppress the evidence seized from his person at the time of his arrest; and (3) that the evidence was insufficient to support the conviction.

The Court of Appeals of Indiana, First District, Lybrook, J., affirmed. The affidavit was sufficient to inform a man of common intelligence that he was being charged with possession of a dangerous drug. "' . . . in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.'" "A search incident to arrest is not rendered invalid merely because it precedes a formal arrest or notice of arrest where probable cause for arrest exists prior to the search. [Citations omitted.]" "The question of whether a witness is qualified to give an expert opinion rests within the sound discretion of the trial court, and the court's decision in this area will not be disturbed absent a showing of manifest abuse of that discretion. [Citations omitted.]"

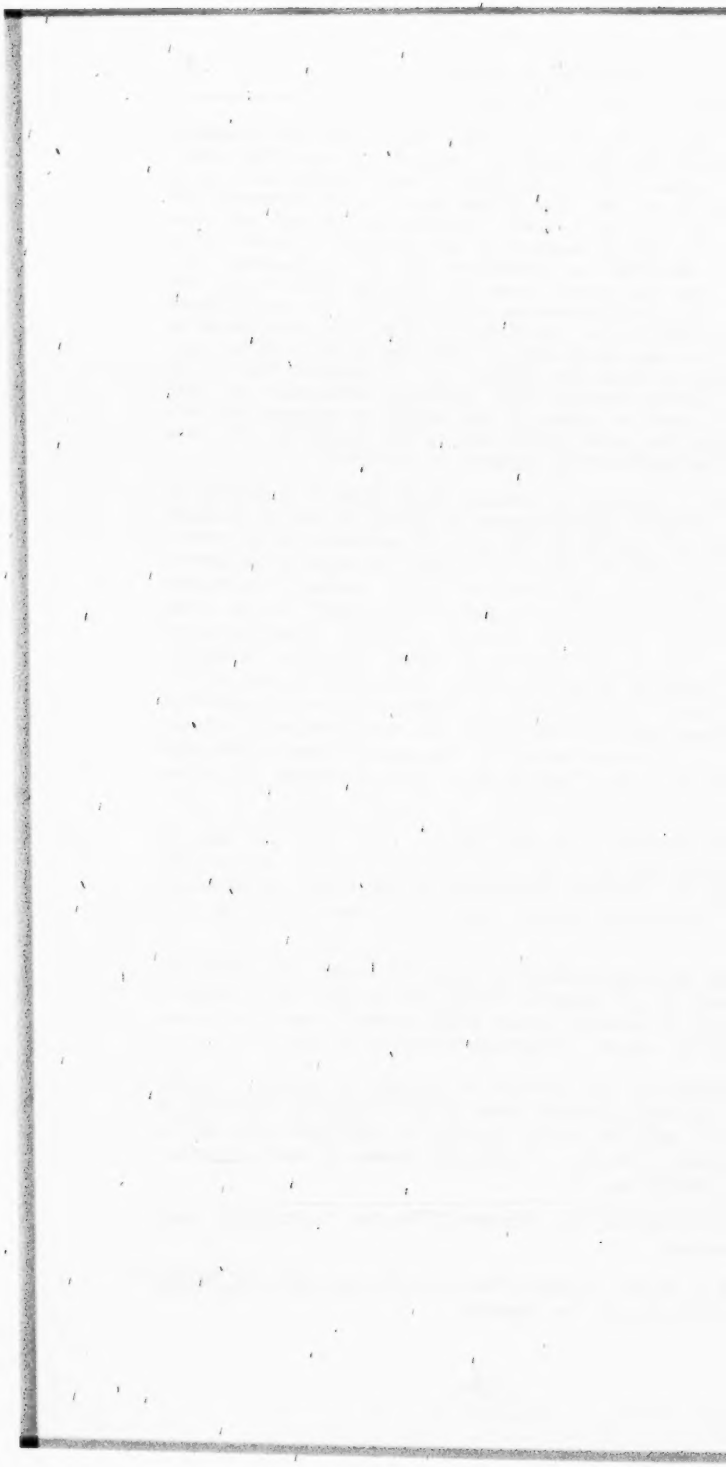
SEARCHES AND SEIZURES—Custodial Arrest. "' . . . in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.'" pp. 184, 185.

SEARCHES AND SEIZURES—Search Incident to Arrest. "A search incident to arrest is not rendered invalid merely because it precedes a formal arrest or notice of arrest where probable cause for arrest exists prior to the search. [Citations omitted.]" p. 190.

WITNESSES—Experts. "The question of whether a witness is qualified to give an expert opinion rests within the sound discretion of the trial court, and the court's decision in this area will not be disturbed absent a showing of manifest abuse of that discretion. [Citations omitted.]" p. 191.

APPEARANCES: Ferd Samper, Jr., Samper & Samper, Indianapolis, Indiana, for Appellant.

Theodore L. Sendak, Attorney General of Indiana, David A. Miller, Deputy Attorney General, for Appellee.



LYBROOK, J.

Defendant-appellant Mark Sizemore appeals from a conviction of possession of dangerous drugs, to-wit: less than twenty-five grams of marijuana, and presents the following issues for review:

1. Whether the trial court erred in overruling appellant's motion to quash the charging affidavit.

2. Whether the trial court erred in overruling appellant's motion to suppress evidence discovered on his person through a search incident to arrest.

3. Whether the evidence was sufficient to prove the identity of the alleged drug substance.

A search of the record to determine the facts most favorable to the State reveals the following sequence of events leading up to appellant's arrest.

While on patrol duty in the early morning hours of January 16, 1972, Officers Terry Worley and John Earl of the Connersville Police Department observed a red van pull away from the curb in a fast manner. Pulling in behind the van, they noticed that one of its tail lights was not illuminated. While following the van, they observed it cross the center line of the road at least three times. At one point, the van was driven left of the center line for approximately three blocks. The officers then stopped the vehicle on the basis of the faulty tail light and erratic driving.

Appellant, the driver and sole occupant of the vehicle, was immediately arrested for the violation of operating the vehicle with the tail light burned out. Officer Worley observed appellant as he was being questioned by Officer Earl. Worley testified that on the basis of appellant's driving and manner during questioning, he formed the opinion that appellant was driving under the influence and decided to place him under arrest for that offense.

Prior to making a formal arrest and placing appellant in the patrol car, Officer Worley conducted a pat down search of appellant's person. As he patted the front of appellant's clothing, Worley discovered a bulge in his shirt pocket. To Worley's inquiry concerning what was in the pocket, appellant responded that he did not know. Worley then reached into appellant's pocket and removed a hand rolled cigarette which

was later identified by expert testimony as containing marijuana.

Appellant was then informed that he was under arrest for driving while under the influence and illegal possession of marijuana. After being advised of his constitutional rights, appellant was placed in the patrol car and taken to police headquarters.

Trial by court on a two-count affidavit resulted in findings of not guilty on the charge of driving under the influence of dangerous drugs and guilty on the charge of possession of marijuana.

ISSUE 1.

Prior to trial, appellant filed a motion to quash the affidavit on the grounds that it did not state the offense charged with sufficient certainty. Error is now alleged in the decision of the trial court overruling the motion.

That part of the affidavit to which the motion was directed charges that appellant " . . . did then and there unlawfully have possession of or have under his control a certain dangerous drug, to-wit: less than 25 grams of Marijuana, ..." Appellant submits that the affidavit fails to state a public offense due to the insertion of the phrase "have under his control," since IC 1971, 16-6-8-3; Ind.Ann.Stat. § 35-3333 (c) (Burns' 1973 Cum. Supp.) proscribes only "possession" or "sale" of dangerous drugs. The crux of appellant's contention is that there is a vast difference in meaning between "possession" and the phrase "have under his control." However, appellant has offered no argument to enlighten us as to this difference. Moreover, we note that "control" is specified as an element of "possession" at *Black's Law Dictionary*, p. 1325 (Rev. 4th Ed. 1968).

The relevant question for our determination is whether the affidavit is sufficient to inform a man of common intelligence that he is being charged with possession of a dangerous drug and therefore apprise him of the nature of the charges that he is to defend. In our opinion, this question must be answered in the affirmative. See, *Thomas v. State* (1968), 251 Ind. 76 [14 Ind.Dec. 569], 238 N.E.2d 20.

Further, appellant's contention must fail since he has failed to demonstrate any prejudice resulting from this alleged defect in the affidavit. To constitute grounds for re-

versal, defects or imperfections in the affidavit must have prejudiced the substantial rights of the defendant. *Thorne v. State* (1973), —— Ind. —— [35 Ind.Dec. 200], 292 N.E.2d 607.

The record reveals that appellant was clearly aware of the nature of the crime with which he was being charged. We therefore conclude that the trial court did not err in overruling appellant's motion to quash.

ISSUE 2.

Appellant next argues that the trial court erred in overruling his motion to suppress the evidence seized from his person at the time of his arrest.

The question of the validity of a search of an arrestee's person in relation to Fourth Amendment constitutional guarantees was recently considered by the United States Supreme Court in *United States v. Robinson* (1973), —— U.S. ——, 94 S.Ct. 467, 38 L.Ed.2d 427, and a companion case *Gustafson v. Florida* (1973), —— U.S. ——, 94 S.Ct. 488, 38 L.Ed.2d 456. These cases centered upon the admissibility, in prosecutions for unlawful possession of drug substances, of evidence seized from the defendants' persons during searches incident to arrests for traffic code violations.[1]

The court found that in each case the evidence was seized as a result of a lawful search incident to arrest. In *Robinson*, it was held:

> " . . . The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant re-

[1]Respondent Robinson and petitioner Gustafson were arrested, respectively, for "operating after revocation and obtaining a permit by misrepresentation," and "failure to have his vehicle operator's license in his possession."

quirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."[2]

In arriving at this holding, the court emphasized the historical distinction between a search of the person of the arrestee and a search of the area beyond his person but within his control.

Through an examination of previous decisions dealing with the subject, Justice Rehnquist concluded:

> "Throughout the series of cases in which the Court has addressed the second proposition relating to a search incident to a lawful arrest—the permissible area beyond the person of the arrestee which such a search may cover—*no doubt has been expressed as to the unqualified authority of the arresting authority to search the person of the arrestee. E.g., Carroll v. United States*, 267 U.S. 132 (1925); *Marron v. United States*, 275 U.S. 192 (1927); *Go-Bart Co. v. United States*, 282 U.S. 344 (1931); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Harris v. United States*, 331 U.S. 145 (1947); *Trupiano v. United States*, 334 U.S. 699 (1948); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Preston v. United States*, 376 U.S. 364 (1964); *Chimel v. California*, 395 U.S. 752 (1969)." (Our emphasis.)

In support of this conclusion, the court quoted the following statement from *Chimel*, the most recent of the cases considering the validity of a search of the area beyond the person of the arrestee:

> " 'When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.' "

Terry v. Ohio (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, was distinguished since it dealt not with a search incident

[2]While the court offers no direct definition of the term "custodial arrest," it is noted in the opinions that Robinson and Gustafson were (1) arrested and (2) taken into custody in the sense that the officers intended to transport them to a police facility.

to an arrest, but rather with a "frisk" incident to an investigative stop based on less than probable cause to arrest. The court noted that the *Terry* opinion:

> ". . . explicitly recognized that there is a 'distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons':
>
> 'The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, *Preston v. United States*, 376 U.S. 364, 367 (1964), is also justified on other grounds, *ibid.*, and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Mr. Justice Fortas, concurring). Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a 'full' search even though it remains a serious intrusion.
>
> . . . An arrest is a wholly different type of intrusion upon the individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person.' 392 U.S., at 25-26 (footnote omitted).
>
> *Terry*, therefore, affords no basis to carry over to a probable cause arrest the limitations this Court placed on a stop-and-frisk search permissible without probable cause."

While *Robinson* and *Gustafson* represent a significant step toward clarification in a particularly confused area of the law, we cannot terminate our inquiry at this point and apply the standards of those decisions to the facts and circumstances presented in the instant case. Since these two decisions have not yet been applied to Indiana law, it remains for us to de-

termine whether the decisions of this Court and our Supreme Court permit the conclusion that a search of an arrestee's person incident to a valid custodial arrest is "reasonable," absent additional justification, by virtue of the arrest alone.

In *Paxton v. State* (1970), 255 Ind. 264 [23 Ind.Dec. 483], 263 N.E.2d 636, our Supreme Court addressed the question of the nature and scope of a search that can be made incident to a valid arrest for a traffic violation. At trial, appellant Paxton unsuccessfully sought to have suppressed evidence pertaining to charges of theft and second degree burglary, which evidence was seized from his automobile during a search incident to an arrest for reckless driving.

Based upon an analysis of several of the United States Supreme Court cases which were discussed in *Robinson* and *Gustafson*, the court reversed Paxton's conviction holding that his motion to suppress evidence should have been sustained.

The court premised its reasoning on the following statement from *Trupiano v. United States* (1948), 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1633:

> " 'A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest.' " [23 Ind.Dec. at 488.]

Of *Chimel*, the court said:

> ". . . The Courts holding expressly utilized the reasoning of *Trupiano* by recognizing that the exigencies of the circumstances often required immediate action on the part of the arresting officer to prevent harm to himself or the destruction of evidence.
>
> . . .
>
> . . . it was made clear that the *necessities of the situation at the time of the arrest* justify the warrantless intrusion, not the fact of the arrest." [23 Ind.Dec. at 489.]

Following an application of the guidelines expressed in *Terry, supra*, the court concluded:

> ". . . Thus, it would clearly be unreasonable to sanction a search incident to an arrest, absent other factors, where the arresting officer had no reason to suspect that he was

in danger *or* where there was no probable cause to believe that there was destructible evidence relating to the crime within the suspect's immediate control.

. . .

Clearly, the reasonableness of a warrantless search incident to an arrest in terms of both its initiation and scope must be determined from the inherent necessities of the circumstances surrounding the arrest." [23 Ind.Dec. at 490.]

Finally, the court noted that the guidelines set out in *Chimel* for the permissible scope of a search incident to arrest are extended somewhat when a person is arrested in an automobile. The exigent circumstances existing in such a case permit a search of the entire automobile without regard to the officer's safety or the possible destruction of evidence in the presence of probable cause to believe that seizable items are contained therein. See, *Carroll v. United States* (1925), 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543.

An application of these principles to the facts resulted in a conclusion that the search of Paxton's automobile was not reasonable. Since Paxton and his companions had been placed in the squad car prior to the search wherein the evidence sought to be suppressed was discovered, the officers no longer had reason to perceive danger from any weapon secreted in the automobile, nor could the men have destroyed any evidence contained in the automobile. Further, the court was unable to conceive of any seizable items which could be present in the car relating to the arrest for reckless driving.

In light of the recent holdings in *Robinson* and *Gustafson*, it is clear that *Paxton* is distinguishable from the instant case. *Paxton* specifically confronted the issue of what the United States Supreme Court in *Robinson* has termed ". . . the second proposition relating to a search incident to a lawful arrest—the permissible area beyond the person of the arrestee which such a search may cover. . . ." Further, we would emphasize that the principles underlying the *Paxton* decision were derived from cases which, according to *Robinson*, do not speak to the issue of the search of an arrestee's *person* incident to an arrest. Given this distinction, subsequent Indiana cases testing the validity of searches of automobiles against *Paxton* standards are likewise distinguishable from the instant case. *E.g., Smith v. State* (1971), 256 Ind. 603 [26 Ind.Dec. 275], 271 N.E.2d 133; *Sayne v. State* (1972), —— Ind. —— [29 Ind.Dec. 456], 279 N.E.2d 196.

Two recent cases, one decided by our Supreme Court and another by this Court, appear to accord implicit recognition to the distinction between the search of an arrestee's person and the search of the area beyond his person but within his control. In *Sanchez v. State* (1971), 256 Ind. 140 [25 Ind.Dec. 1], 267 N.E.2d 374, appellant's conviction based on evidence seized from his person pursuant to a search incident to arrest was affirmed. Justice Prentice, speaking for a unanimous Court, distinguished *Chimel*, saying that there was "no similarity between the circumstances of that case and the one at bar. [25 Ind. Dec. at 3.]" In *Walker v. State* (1973), —— Ind.App. —— [35 Ind.Dec. 452], 293 N.E.2d 35 (transfer denied), this Court said:

> "In *Chimel* there was no basic disagreement between the majority and the dissenters over the question of a search of the person at the time and incident to a valid arrest. Likewise, in *Paxton v. State*, —— Ind. —— [23 Ind.Dec. 483], 263 N.E.2d 636 (1970), there was no basic difference in our own Supreme Court when it followed and applied *Chimel*. In *Paxton* as in *Chimel* both the majority and dissenting opinions were premised on the accepted proposition that an arresting police officer may, incident to a valid arrest, search the person and the clothing of the arrestee." [35 Ind.Dec. at 462.]

In reaching the above decisions, the courts quoted that portion of the text of *Chimel* which, according to *Robinson*, recognizes the unqualified authority of the arresting officer to search the person of the arrestee.

On the basis of the foregoing analysis, we conclude that the principles expressed in *Robinson* and *Gustafson* are directly applicable and dispositive of the issue of the validity of the search of Sizemore's person in the instant case.

Initially, we must disagree with Sizemore's apparent assumption that the search of his person was incidental to his arrest for operating his vehicle with a tail light burned out. The following testimony of Officer Terry Worley during the hearing on the motion to suppress reveals that the search was incident to a valid arrest for driving under the influence.

"Q. And, uh, why did you give this search?

A. I would say that after the coordination test and everything I felt like he was under the influence of something. I was going to place him under arrest. I was

> going to place him in the vehicle, and before I do this I must search him for anything that might harm himself or me."

A search incident to arrest is not rendered invalid merely because it precedes a formal arrest or notice of arrest where probable cause for the arrest exists prior to the search. *Mann v. State* (1973), —— Ind.App. —— [35 Ind.Dec. 185], 292 N.E.2d 635; *Smith v. State, supra; Paxton v. State, supra; Hadley v. State* (1968), 251 Ind. 24 [15 Ind.Dec. 45], 238 N.E.2d 888. The record in the instant case clearly reveals that on the basis of appellant's erratic driving and abnormal behavior after being stopped, the officers were provided with probable cause for the arrest prior to the search. The testimony at the hearing on the motion to suppress reveals that the officers were effectuating a "custodial arrest" within the usage of that term in *Robinson* and *Gustafson*, in that Sizemore was being taken into custody for driving under the influence.[3]

We therefore hold that the search of Sizemore's person fell within a valid exception to the warrant requirement of the Fourth Amendment to the Constitution. That search being incident to a lawful custodial arrest based on probable cause, it was a "reasonable" intrusion under that amendment and requires no additional justification.

The only limitation imposed upon an officer in searching an arrestee's person incident to a valid custodial arrest is found in the closing paragraph of *Robinson*:

> ". . . While thorough, the search partook of none of the extreme or patently abusive characteristics which were held to violate the Due Process Clause of the Fourteenth Amendment in *Rochin v. California*, 342 U.S. 165 (1952)."

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[3]IC 1971, 9-4-1-131 (Burns' Code Edition) prescribes the procedure for release of a person arrested for a violation punishable as a misdemeanor under Chapter One of the Uniform Act Regulating Traffic on Highways upon the giving of a written promise to appear in court. This section has been interpreted as mandating release by the arresting officer where the arrestee signs such a written promise. Op.Atty.-Gen. 1961, No. 17, p. 83. We express grave doubt that such an arrest could be construed as a "custodial arrest" within the terms of *Robinson, supra*, and *Gustafson, supra*. However, we need not address that issue in this decision since the privilege of release conferred under this section does not apply to the offense of driving under the influence. *McClanahan v. State* (1954), 233 Ind. 317, 117 N.E.2d 749. See also, Op. Atty.-Gen. 1969, No. 41, p. 124.

While the search in the instant case might be categorized as thorough, it was not extreme or abusive in character. It therefore follows that the trial court did not err in overruling Sizemore's motion to suppress.

ISSUE 3.

Sizemore next contends that the evidence is insufficient to support his conviction. Specifically, he argues that the State did not prove beyond a reasonable doubt that the substance seized from his person was a dangerous drug.

At trial, Fayette County Sheriff L. Max Huffman testified that he performed a preliminary field test on the substance using a "Va!-Tox" testing device. The results of this test were positive, indicating the presence of marijuana. Paul Asa, Assistant Director of the Indiana State Police Laboratory, also testified that the substance in question contained marijuana. Asa's opinion was based on microscopic and chemical examination, including thin layer chromotography. He further testified that he had served as a laboratory technician for approximately ten years and had attended federal and State schools relating to dangerous drugs.

Appellant initially infers that Asa lacked sufficient qualifications to render an opinion in this case. The question of whether a witness is qualified to give an expert opinion rests within the sound discretion of the trial court, and the court's decision in this area will not be disturbed absent a showing of manifest abuse of that discretion. *Patterson v. State* (1970), 255 Ind. 22 [23 Ind.Dec. 67], 262 N.E.2d 520; *Tyler v. State* (1968), 250 Ind. 419 [14 Ind.Dec. 333], 236 N.E.2d 815.

Asa testified concerning his training and experience in this area and the trial court apparently concluded on the basis of this testimony that he was sufficiently qualified to render an opinion as to the identity of the substance tested. In our opinion, appellant has failed to demonstrate any abuse of discretion.

Sizemore's main contention with respect to this issue is that the State failed to prove the identity of the substance in question beyond a reasonable doubt. At the time of the offense, prior to the 1973 Amendment, IC 1971, 16-6-8-2; Ind. Ann.Stat. § 35-3332 (Burns' 1973 Cum. Supp.) read in part:

> ". . . (j) 'Dangerous drug' means . . . (4) any hallucinogenic, psychedelic, psychogenic drug or substance in-

cluding but not limited to Cannabis or lysergic acid diethylamide, commonly known as LSD. . . .

. . .

(1) 'Cannabis' includes all parts of the plant Cannabis Sativa, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seeds, or resin, including specifically the drugs known as American hemp, marijuana, Indian hemp or hashish, as used in cigarettes, or in any other articles, compounds, mixtures, preparations, or products whatsoever, but shall not include the mature stalks of the plant; fiber produced from such stalks, oil or cake made from the seeds of such plant; any compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except resin extracted therefrom); fiber, oil or cake; or the sterilized seed of such plant which is incapable of germination."

During cross-examination, Asa was asked if he tested the alleged drug substance to determine whether it was *Cannabis Indica* or *Cannabis Sativa*. Asa responded that he had not. Appellant argues that only *Cannabis Sativa* is a dangerous drug within the terms of the statute and that in the absence of a test to distinguish it from *Cannabis Indica*, the State has failed to prove that the substance in question is a dangerous drug.

This contention was answered in *United States v. Moore* (3rd Cir. 1971), 446 F.2d 448, as follows:

"Before this argument may have an validity, Cannabis Indica must in fact not be a substance called Cannabis Sativa L. or marihuana.

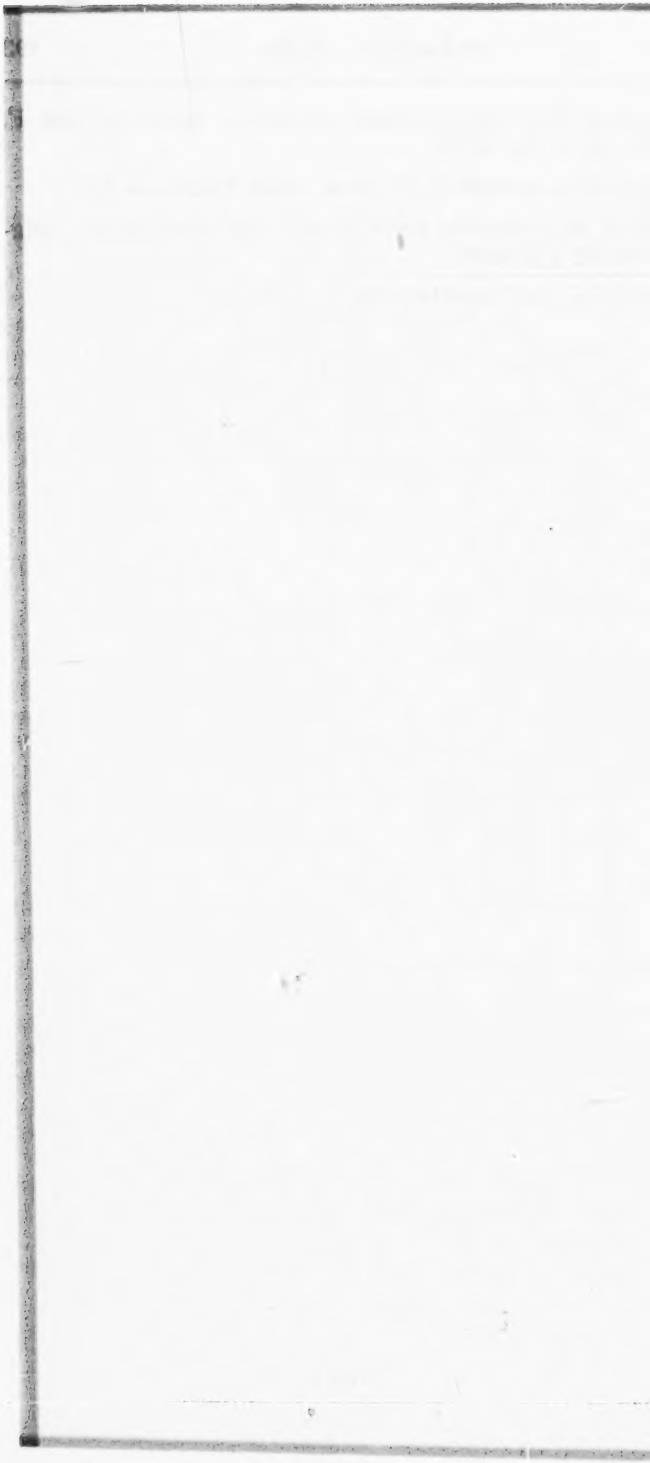
Marihuana, a term of Mexican origin, is the dried leaves and flowering tops of a plant species commonly known as hemp. Botanically, the hemp plant is called Cannabis Sativa L. There is only one species of this plant. *Leary v. United States*, 395 U.S. 6, 50, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969). However, because of the difference in soil content and climatic conditions, the plant grown in various parts of the world is not physically the same. For example, Mexican marihuana is more potent than domestic and is consequently preferred by smokers. *Leary v. United States*, *supra*, at 49, 89 S.Ct. 1532. Cannabis Indica is the name given to Cannabis Sativa L. grown in India."

See also, The District Court opinion in *Moore*, at 330 F. Supp. 684 (E.D. Pa. 1970).

Appellant's contention of error must therefore fail.

Finding no reversible error in the trial proceedings, judgment is hereby affirmed.

Robertson, P.J., and Lowdermilk, J., concur.



STATE -- INDIANA

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

BILLIE R. McCULLOUGH, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204

TELEPHONE 633-5200

No. 1-973A169

Mark Sizemore V. State of Indiana

You are hereby notified that the Court of Appeal

has on this day Appellants petition for Rehearing Denied.Hoffman,Jr.C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 23rd day of April, 1974

Billie R. McCullough
Clerk Supreme Court and Court of Appeals

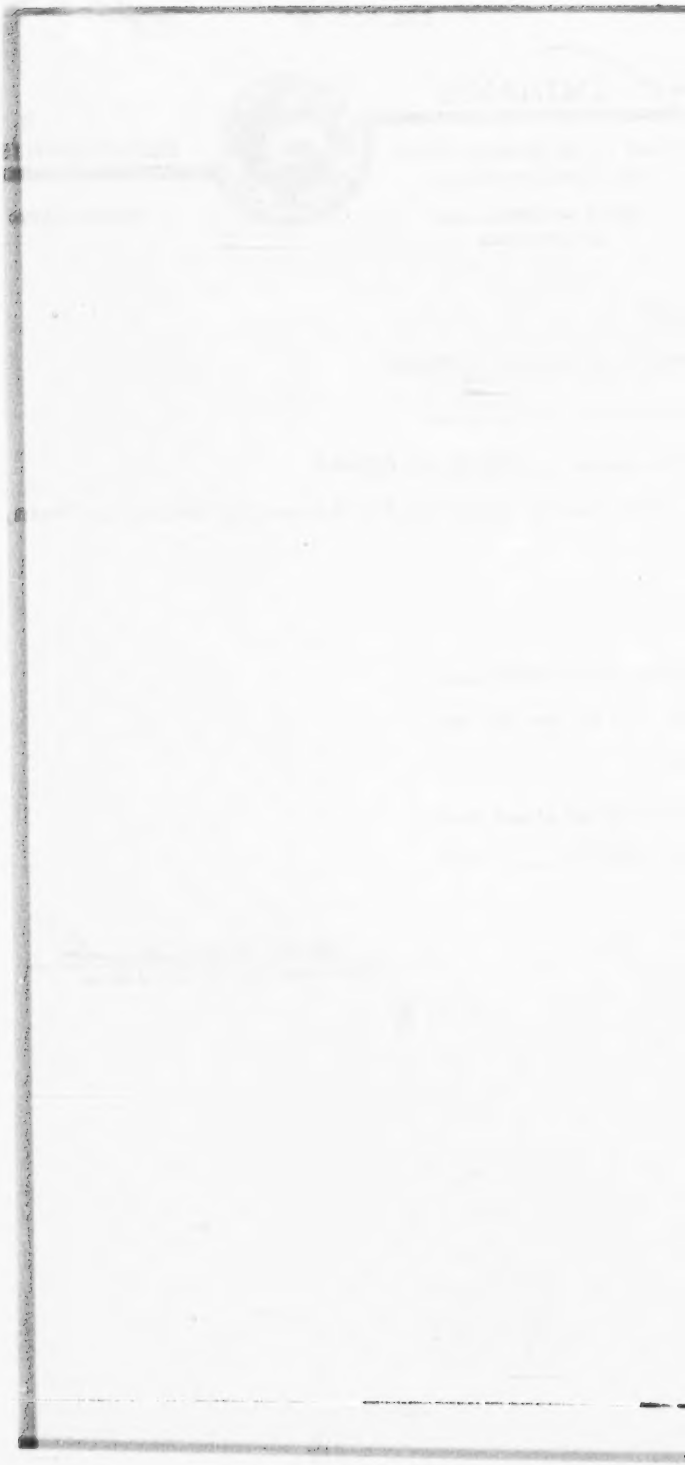


EXHIBIT "C"

STATE OF INDIANA

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

BILLIE R. McCULLOUGH, CLERK
217 STATE HOUSE

INDIANAPOLIS, 462

TELEPHONE 633-5200

No. 1-973A169

Mark Sizemore V. State of Indiana

You are hereby notified that the Supreme Court has on this day Denied Appellants Petition to Transfer. Hunter, Acting C. J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 10th day of September, 1974

Billie R. McCullough
Clerk Supreme Court and Court of Appeals